

MEMORANDUM FOR REGIONAL DIRECTORS (1PZ, 4PZ, 7PZ, 9PZ, WPZ)

FROM: FLAVIO PERES (b) (6)
ASSISTANT COMMISSIONER
OFFICE OF REAL PROPERTY UTILIZATION AND DISPOSAL

SUBJECT: Handling of Noncompliance, Retransfer and Reversion of Properties
Conveyed for Public Benefit Use (Program Memo 18-PBC Non-
compliance remedies)

DATE: August 10, 2018

This memorandum provides updated guidance to outline options for addressing compliance-related issues at properties conveyed for public benefit (PBC) use, including retransfer, abrogation and reversion. It reflects the steps outlined in the Memorandum of Agreement (MOA) drafted for signature with the sponsoring agencies.

I Purpose

If a compliance-related issue is discovered at a subject property by the PBC sponsoring agency or GSA and the issue can be remedied by the grantee or lessee within a reasonable period of time, the property or a portion thereof may remain in the possession of the grantee or lessee, as appropriate. If a PBC sponsoring agency discovers a compliance-related issue which cannot be remedied, notification shall be provided to GSA in a timely manner. Conversely, if GSA discovers a compliance-related issue which cannot be remedied, notification shall be provided to the appropriate PBC sponsoring agency in a timely manner. Prior to reversion of ownership, the United States at its sole discretion may avail itself of the following options so the property or a portion thereof may remain in use as a PBC, if appropriate. This program guidance is applicable to and in keeping with GSA's and the public benefit sponsoring agencies' regulatory authorities to remedy compliance-related matters.

The authorities through which the programs outlined in this guidance operate are at 16 USC 667b-d, 23 USC 107 and 317, 40 USC 550, 553, 554 and 1304(b), 42 USC 11411, 49 USC 47151.

II Post Conveyance Options

The course of action to be taken is dependent upon the nature of the compliance issue(s), the grantee's history, the likelihood that the compliance issue(s) can be remedied, the characteristics of the property and the authorities, regulations and policies governing each PBC program. Possible compliance-related issues include, but are not limited to the following:

- Use of a property inconsistent with the terms and conditions of the deed of conveyance or the lease
- Underutilization of a property
- The grantee has not made adequate progress with program implementation
- The grantee no longer has a need for the property in its current program of use
- The grantee will or has become non-performing, insolvent and/or has abandoned the property
- The grantee has encumbered the property without Federal authorization
- The grantee is no longer organizationally eligible
- The grantee requests a change in use of the property that is not eligible under the current PBC program.
- The grantee requests transfer of the PBC deed covenants to another property
- The grantee requests removal of the deed covenants for the PBC use (abrogation)

If the grantee is willing and/or able to remedy the compliance issue(s), steps should be taken by the PBC sponsoring agency and/or GSA, depending on the individual program requirements, to ensure that the property is brought into compliance, in order for the PBC program to continue as originally deeded.

In situations where the property will not or cannot be brought into compliance by the current grantee in accordance with the instrument of conveyance, the following approaches may be used to address the situation as appropriate. Given that each situation is unique, the following options do not have an order of priority and each may be utilized as appropriate:

- **Same Grantee, Different Program:** The current grantee may identify another qualifying public benefit use for the property if it is an eligible applicant under the substitute PBC program. In this situation, the grantee, the current and potential substitute PBC sponsoring agency and GSA will coordinate to consider the proposed program use. A change in use requires the review and concurrence by the current PBC sponsoring agency, review and approval by the substitute PBC sponsoring agency and concurrence from GSA. The grantee must submit an application to the appropriate PBC sponsoring agency for review and approval of the newly identified PBC use. If the new application is approved, the original and substitute PBC sponsoring agencies (or GSA where GSA has conveyance responsibility) will coordinate to amend the deed and/or prepare the necessary conveyance documents accordingly. For those PBC programs with finite periods of use restrictions, the time period for compliance requirements will reset to the beginning of the new program's required term. For those PBC programs with use restrictions in perpetuity, the compliance requirements will continue in perpetuity.
- **Different Grantee, Same Program:** If the property is not to be retained by the current grantee and the current PBC sponsoring agency or GSA is aware of or identifies another qualified applicant through appropriate outreach, the property may continue in use under the public benefit program for which it was originally conveyed, but with a different grantee. The new applicant must submit an

application to the appropriate PBC sponsoring agency for review and approval. If a new application is approved, the PBC sponsoring agency shall prepare and execute the necessary documents and/or amend the deed for those programs for which the PBC sponsoring agency has conveyance responsibility. The PBC sponsoring agency may request the current grantee to draft the transfer deed subject to review and signature by all parties involved (the current and proposed new grantee and PBC sponsoring agency). Those PBCs for which GSA has conveyance responsibility, upon recommendation from the PBC sponsoring agency, GSA shall prepare and execute the necessary documents and/or amend the deed as necessary. For those PBC programs with finite periods of use restriction, the time period for compliance requirements will reset to the beginning of the program's required term. For those PBC programs with use restrictions in perpetuity, the compliance requirements will continue in perpetuity.

- **Outreach:** If the property is not to be retained by the current grantee and the current PBC sponsoring agency does not identify a substitute user, GSA may then perform outreach to additional PBC sponsoring agencies and the appropriate public bodies and nonprofit organizations. Outreach may be through a Notice of Availability ("Notice") listing the potential public benefit uses of the property. The Notice shall typically state that expressions of interest must be received by the sponsoring agency(ies) and GSA within thirty (30) days of the date of the Notice. The Notice shall also provide points of contact for additional information with instructions for obtaining an application.
- **Different Grantee, Different Program:** In the event a substitute qualified applicant is approved to acquire the property under another PBC program, the current PBC sponsoring agency (or GSA where GSA has conveyance responsibility) will coordinate with the new PBC sponsoring agency to prepare the necessary documents and/or amend the existing deed or re-deed the property, depending on the specific requirements of the PBC program and the statutes governing real estate conveyances wherein the property is located. For those PBC programs with finite periods of use restriction, the time period for compliance requirements will reset to the beginning of the program's required term. For those PBC programs with use restrictions in perpetuity, the compliance requirements will continue in perpetuity.
- **Transfer of Covenants:** In the event the current grantee requests or agrees to transfer of the use covenants of an existing PBC to an alternate property, the grantee shall collaborate with the PBC sponsoring agency and GSA. For those PBC programs that the sponsoring agencies deed, the grantee shall collaborate with the sponsoring agency, who will collaborate with GSA to seek concurrence. If a suitable alternative property is identified, the current deed will be amended to reflect the transfer of covenants. In general, the property to which the covenants are transferred must be equal in market value to the existing PBC property and provide equal or greater public benefit. It is also necessary that the property to which the covenants are being transferred is not already use-restricted for same

public purpose. This is necessary to ensure that the net public benefit use under the PBC program remains equalized. The Federal Government's reversionary interest shall also transfer to the property to which the covenants are transferred.

- **Abrogation:** In the event the current grantee desires to retain the real property and requests removal of the deed covenants/use requirements without replacement (abrogation), the sponsoring agency and GSA shall collaborate to determine if an abrogation is appropriate to the situation, program regulations and policy. If so, the sponsoring agency and GSA shall collaborate to work with the grantee to establish the terms and conditions of the potential abrogation including but not limited to, developing an appropriate scope of work and ordering an appraisal. Such terms and conditions shall typically include payment to the Federal Government of the fair market value, as approved by GSA, of the property being abrogated and shall comply with the PBC sponsoring agency and GSA policies, deed requirements and/or regulations. For those PBC programs that the sponsoring agencies deed, the grantee shall collaborate with the sponsoring agency, who will collaborate with GSA in its concurrence role. For properties that were conveyed under PBC programs with finite periods of use covenants, pro-rated credit toward the consideration paid for the abrogation may be applied for the period of time the property was utilized in full compliance with the deed of conveyance. For properties conveyed under PBC programs with perpetuity use covenants, abrogation of covenants will typically be at full fair market value. In either case, the fair market value shall be as of the date of abrogation.
- **Reversion of Whole or Part:** Reversion is at the sole option of the Government. If a substitute public benefit use, grantee or alternative remedy is not identified to cure the non-compliance issue, the PBC sponsoring agency (or GSA, for properties where GSA has conveyance responsibility) shall undertake reasonable due diligence to determine if it is in the best interest of the Government to revert the property. If so, the Government shall take the steps necessary to revert the property to Federal ownership in accordance with applicable statute and regulations. A sponsoring agency may collaborate with GSA to proceed with an involuntary reversion in cases of continued or willful violations of regulatory or deed provisions. Reversion is contingent on the GSA's ability to accept the property as excess and back into federal ownership.
- **Historic Preservation and Other Covenants:** Please note that when considering any of the options above, any historic and/or environmental covenants that run with the land must be taken into account. Although the program use covenants may be changed to reflect a new PBC program, or lifted entirely in the case of land exchanges and abrogation, additional covenants not associated with a particular PBC use, that run with the land, would need to be addressed. For example, if one of the above options is being contemplated for an historic property (a property listed, or eligible for listing in the National Register of Historic Places), the options listed in this memorandum would not release the

grantee from compliance with historic preservation restrictions imposed as a result of previous consultations under Section 106 of the National Historic Preservation Act. Section 106 is triggered by the conveyance of an historic property out of Federal ownership, and the process concludes with a preservation covenant/easement to protect the property in perpetuity. Thereafter, the Government's decision to alter the original program through any of the above options may fall within the definition of a Federal undertaking and may trigger a new Section 106 consultation, during which the lead federal agency would need to assess the potential effects of the decision and take steps to avoid, minimize or mitigate any adverse effects associated with the proposed option.. Compliance with the National Environmental Policy Act may also be necessary.

III Base Realignment and Closure (BRAC) Public Benefit Conveyances

The Delegation of Authority (DOA) from GSA authorizing the Secretary of Defense to dispose of real property under the Base Realignment and Closure Act (BRAC) for the period February 15, 2014 through February 14, 2019 stipulates that post-conveyance activities for PBCs conveyed by the military services under BRAC will henceforth be handled by GSA in accordance with the DOA (attached as Exhibit "A"). Accordingly, when addressing issues related to noncompliance, abrogation, transfer of restrictions, and reversion of real property for those PBCs conveyed through BRAC, GSA will partner with the appropriate sponsoring agencies, military service and grantee to exercise the various options outlined in Part II of this memorandum.

IV Timing

It is understood that remedying a compliance-related issue(s) could extend over a period of time. However, it is agreed that the sponsoring agency and/or GSA, shall take all necessary efforts to resolve the issue(s) within one calendar year from the date the issue(s) are identified.

